



April 25, 2001

Mr. Paul C. Sarahan
Director, Litigation Division
Texas Natural Resource Conservation Commission
P.O. Box 13087
Austin, Texas 78711-3087

OR2001-1676

Dear Mr. Sarahan:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 146417.

The Texas Natural Resources Conservation Commission (the "commission") received a request "to review all [commission] records and documents" pertaining to the Malone Service Company Swan Lake Plant in Texas City, Texas. You state the commission has made available to the requestor some of the requested information. You assert that the remaining requested information, or portions thereof, is excepted from disclosure under sections 552.101, 552.103, 552.107(1), 552.110, and 552.111 of the Government Code. Because the release of some of the information at issue may affect the proprietary interests of a third party, Southeast Texas Environmental, L.L.C. ("Southeast"), the commission also notified the attorney for Southeast of the request, in compliance with section 552.305 of the Government Code. Through its attorney, Southeast responded to the notice and asserts its information is excepted from disclosure under sections 552.101 and 552.110 of the Government Code. We have considered the asserted exceptions, the submitted comments and arguments, and we have reviewed the submitted enclosures 1 through 4, which you state are representative samples of the information at issue.¹

¹We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

At the outset, we note that some of the submitted documents are indicated to have been filed with a court, and thus appear to constitute information that is also contained in a public court record. *See* Gov't Code § 552.022(a)(17). To the extent the information is also contained in a public court record, the information is not excepted from required disclosure and must be made available to the requestor. Some of the copies of court filed documents contain handwritten notations — information that evidently is not contained in a public court record. Therefore, we will address your claimed exceptions for the handwritten notations.

Both the commission and Southeast have asserted sections 552.101 and 552.110 for the information in enclosure 2.² Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. The commission raises section 361.037 of the Health and Safety Code. This provision applies to records pertaining to hazardous waste management and control. Section 361.037(b) states in pertinent part: "If the owner of the records shows to the satisfaction of the executive director [of the commission] that the records would divulge trade secrets if made public, the commission shall consider the [] records confidential." Section 552.110 protects the property interests of private persons by excepting from disclosure two types of information: (1) trade secrets obtained from a person and privileged or confidential by statute or judicial decision and (2) commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained. The governmental body, or interested third party, raising this exception must provide a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from disclosure. Gov't Code § 552.110(b); *see also National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974).

The commission asserts the applicability of section 552.110(a). The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex.), *cert. denied*, 358 U.S. 898 (1958); *see also* Open Records Decision No. 552 at 2 (1990). Section 757 provides that a trade secret is

any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage

²The commission's 552.101 and 552.110 assertions were not timely made in accordance with the requirements of section 552.301(b) of the Government Code. *See* Gov't Code § 552.301(b). If a governmental body does not request a decision from this office as provided by section 552.301, the information at issue "is presumed to be subject to required public disclosure and must be released unless there is a compelling reason to withhold the information." Gov't Code § 552.302. This office has long held that a compelling reason sufficient to overcome the section 552.302 presumption of openness exists where the information is confidential by law or its release implicates the interests of a third party. *See, e.g.,* Open Records Decision No. 150 (1977). Accordingly, we herein address the section 552.101 and 552.110 assertions.

over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to single or ephemeral events in the conduct of the business A trade secret is a process or device for continuous use in the operation of the business. . . . [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939). In determining whether particular information constitutes a trade secret, this office considers the Restatement's definition of trade secret as well as the Restatement's list of six trade secret factors. RESTATEMENT OF TORTS § 757 cmt. b (1939).³ This office has held that if a governmental body takes no position with regard to the application of the trade secret branch of section 552.110 to requested information, we must accept a private person's claim for exception as valid under that branch if that person establishes a *prima facie* case for exception and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 at 5-6 (1990). In this instance, Southeast did not argue the applicability of section 552.110(a), but we have considered whether the commission has made a *prima facie* demonstration of trade secret. Assuming the information meets the above definition, the commission's comments pertaining to the six trade secret factors are inadequate for this office to conclude that a *prima facie* showing of trade secret has been demonstrated in this instance. Accordingly, we conclude the information is not excepted from disclosure by section 552.110(a) or by section 552.101 in conjunction with section 361.037(b) of the Health and Safety Code.

Southeast asserts its information must be withheld pursuant to section 552.110(b). However, neither the commission nor Southeast has demonstrated through specific factual or evidentiary material, rather than conclusory or generalized allegations, that substantial competitive injury would likely result from disclosure of the information. Thus, we have no

³The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are:

- (1) the extent to which the information is known outside of [the company]; (2) the extent to which it is known by employees and others involved in [the company's] business;
- (3) the extent of measures taken by [the company] to guard the secrecy of the information;
- (4) the value of the information to [the company] and [its] competitors; (5) the amount of effort or money expended by [the company] in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

basis for concluding that the information is subject to section 552.110(b) protection. Accordingly, the information in enclosure 2 may not be withheld under section 552.110.

You assert section 552.103 for the information in enclosures 1 and 3. We note, however, that the documents in enclosure 2 are also contained in enclosure 1. We shall therefore consider the applicability of section 552.103 to enclosures 1, 2, and 3. Section 552.103 states in pertinent part as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

....

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

The commission has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.--Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The commission must meet both prongs of this test for information to be excepted under 552.103(a). You state:

The [commission] has an appeal of an enforcement action pending against Malone Service Company's facility in Texas City. Litigation is currently pending in state district court, following the appeal by Malone Service Company of the [c]ommission's decision to revoke three permits held by Malone Service Company. Linda Secord and Albert Bronson of the Attorney General's Natural Resource Division are handling this appeal. . . . Documents relevant to the pending enforcement actions include internal [commission] documents, such as enforcement referral documents, inspection reports, violation summaries, penalty calculations, and internal documents related to [issues in the litigation]. Public disclosure of this information could jeopardize the [commission's] resolution of the enforcement action against Malone Service Company's facility in Texas City.

Based on your arguments and representations, as well as our review of the information at issue, we conclude that litigation was pending at the time of the request, and that the information relates to the litigation. You have accordingly demonstrated the applicability of section 552.103(a) to the information represented by enclosures 1, 2, and 3.

Generally, however, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Some of the information at issue evidently came from an opposing party or a third party. It thus appears that at least portions of the information at issue may have already been made available to the opposing parties. To the extent the information has been made available to the opposing parties, it is not excepted from disclosure by section 552.103(a). Further, the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982). You also assert the attorney-client privilege under section 552.107(1) and the attorney work product privilege under sections 552.103 and 552.111 for the information at issue. However, to the extent this information is not excepted from disclosure under section 552.103 because it has been made available to all parties to the litigation, such information is likewise not subject to the attorney-client or work product privileges.

Finally, you assert that sections 552.107(1) and 552.111 apply to the information in enclosure 4. Section 552.107(1) excepts information that an attorney cannot disclose because of a duty to his client. In Open Records Decision No. 574 (1990), this office concluded that section 552.107 excepts from public disclosure only "privileged information," that is, information that reflects either confidential communications from the client to the attorney or the attorney's legal advice or opinions; it does not apply to all client information held by a governmental body's attorney. Open Records Decision No. 574 at 5 (1990). Section 552.107(1) does not except purely factual information from disclosure. *Id.* Section 552.107(1) does not except from disclosure factual recounting of events or the documentation of calls made, meetings attended, and memos sent. *Id.* at 5.

Section 552.111 excepts from disclosure "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." This exception incorporates the deliberative process privilege. In Open Records Decision No. 615 (1993), this office reexamined the predecessor to the section 552.111 deliberative process privilege exception in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.--Austin 1992, no writ), and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 364 (Tex. 2000); *Arlington Indep. Sch. Dist. v. Texas Attorney Gen.*, No. 03-00-00219-CV, 2001 WL 23169, at * 5 (Tex. App.--Jan. 11, 2001, no pet. h.). An agency's policymaking functions do not encompass internal administrative or personnel matters; disclosure of information relating to such

matters will not inhibit free discussion among agency personnel as to policy issues. ORD 615 at 5-6. Additionally, section 552.111 does not generally except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *Arlington Indep. Sch. Dist.* at * 6-7; ORD 615 at 4-5.

Section 552.111 also applies to information coming within the attorney work product privilege. A governmental body may withhold attorney work product from disclosure if it demonstrates that the material was 1) created for trial or in anticipation of civil litigation, and 2) consists of or tends to reveal an attorney's mental processes, conclusions and legal theories. Open Records Decision No. 647 (1996). The first prong of the work product test, which requires a governmental body to show that the information at issue was created in anticipation of litigation, has two parts. A governmental body must demonstrate that 1) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue, and 2) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and conducted the investigation for the purpose of preparing for such litigation. Open Records Decision No. 647 at 4 (1996). The second prong of the work product test requires the governmental body to show that the documents at issue tend to reveal the attorney's mental processes, conclusions, and legal theories.

Although you identified the names of attorneys involved in the litigation, you did not identify most of the individuals named in the documents in enclosure 4, and you did not explain the parties with whom this information has been shared, or the purpose of the communications. Upon careful examination of the information in enclosure 4, and based on the limited information provided this office, we are unable to conclude that the commission has demonstrated that any of the information in enclosure 4 is protected by the attorney-client privilege, the attorney work product privilege, or the deliberative process privilege. We therefore conclude that this information must be released.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

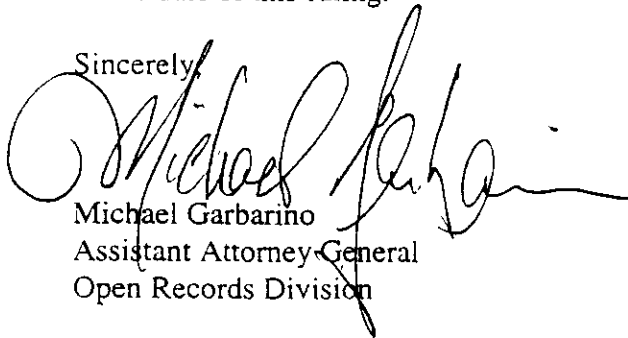
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "Michael Garbarino", is written over the typed name and title.

Michael Garbarino
Assistant Attorney General
Open Records Division

MG/seg

Ref: ID# 146417

Encl. Submitted documents

cc: Mr. Steven Raatz

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